

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1080

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

SAMUEL MOSCHIANO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FROM THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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T A B L E O F C O N T E N T S

	<u>Page</u>
ISSUES PRESENTED-----	1
STATUTE INVOLVED-----	2
PRELIMINARY STATEMENT-----	2
STATEMENT OF FACTS-----	3
ARGUMENT:	
I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION FOR MAKING FALSE DECLARATIONS BE- FORE THE GRAND JURY-----	10
II. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING THE JURY TO SEPARATE FOR A FOUR- DAY WEEKEND AFTER IT BEGAN ITS DELIBERA- TIONS-----	17
CONCLUSION-----	19
CERTIFICATE OF SERVICE-----	20

C I T A T I O N S

Cases:

<u>Blair v. United States</u> , 250 U.S. 273 (1919)-----	14
<u>Branzburg v. Hayes</u> , 408 U.S. 665 (1972)-----	11
<u>Bronston v. United States</u> , 409 U.S. 352 (1973)----	15
<u>Carroll v. United States</u> , 16 F.2d 951 (2nd Cir. 1927), <u>cert. den.</u> , 273 U.S. 763 (1927)-----	11-12
<u>United States v. Acuff</u> , 410 F.2d 463 (6th Cir. 1969), <u>cert. den.</u> , 396 U.S. 830 (1969)-----	18
<u>United States v. Birrell</u> , 470 F.2d 113 (2nd Cir. 1972)-----	12
<u>United States v. Bonacorsa</u> , 528 F.2d 1218 (2nd Cir. 1976), <u>cert. den.</u> , 426 U.S. 935 (1976)-----	15
<u>United States v. Calandra</u> , 414 U.S. 338 (1974)----	14

Cases Cont'd:

Page

<u>United States v. Chapin</u> , 515 F.2d 1274 (D.C. Cir.), <u>cert. den.</u> , 423 U.S. 1015 (1975)-----	15
<u>United States v. Doulin</u> , 538 F.2d 466 (2nd Cir. 1976), <u>cert. den.</u> , ___ U.S. ___, 97 S.Ct. 256-----	11, 12
<u>United States v. Freedman</u> , 445 F.2d 1220 (2nd Cir. 1971)-----	12
<u>United States v. Harris</u> , 458 F.2d 670 (5th Cir. 1972), <u>cert. den.</u> , 409 U.S. 888 (1972)-----	18
<u>United States v. Mancuso</u> , 485 F.2d 275 (2nd Cir. 1973)-----	11, 12
<u>United States v. Siragusa</u> , 450 F.2d 592 (2nd Cir. 1971), <u>cert. den.</u> , 405 U.S. 974 (1972)-----	18
<u>United States v. Umans</u> , 368 F.2d 725 (2nd Cir. 1966), certiorari dismissed as improvidently granted, 389 U.S. 80 (1967)-----	13
<u>United States v. Wolfson</u> , 437 F.2d 862 (2nd Cir. 1970)-----	15

Statutes:

18 U.S.C. 371-----	4
18 U.S.C. 1341-----	4, 10
18 U.S.C. 1623-----	2, 12
18 U.S.C. 1952-----	4
18 U.S.C. 1962-----	4, 10
18 U.S.C. 1962(c)-----	5
18 U.S.C. 1962(d)-----	5
18 U.S.C. 6002-----	4

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v.

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FOR THE WESTERN DISTRICT OF NEW YORK

ISSUES PRESENTED

1. Whether the evidence was sufficient to sustain the conviction for making material false declarations before a grand jury.
2. Whether the trial court abused its discretion in allowing the jury to separate for a four-day weekend after it began its deliberations.

STATUTE INVOLVED

18 U.S.C. 1623 provides in pertinent part:

False declarations before grand jury or court

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

* * * * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

PRELIMINARY STATEMENT

A two count indictment in the United States District Court for the Western District of New York charged Appellant Samuel L. Moschiano with having unlawfully and knowingly made false material declarations under oath before a federal grand jury, in violation of 18 U.S.C. 1623 (Def. App. A1-A8).^{1/} Count One charged appellant with testifying falsely about statements made by him on June 19, 1975 to Kenneth Olson, a special agent of the Federal Bureau of Investigation, relative to the payment by Patrick Marrocco of \$27,000 to Vincent Rallo for the purpose of causing and procuring arson. Count Two charged appellant with having testified falsely

1/ "Def. App." refers to appellant Moschiano's appendix on appeal. "Tr." refers to the four-volume trial transcript. "Gov't. App." refers to the government's appendix on appeal.

about statements he made to Agent Olson relative to whether Patrick Marrocco informed appellant prior to the destruction of his nightclub that it would be burned by arsonists.

After a jury trial in the United States District Court for the Western District of New York (Elfvig, J.), appellant was convicted of Count One but was acquitted by the jury on Count Two. He was sentenced to a term of three years' imprisonment.

STATEMENT OF FACTS

1. The evidence at trial shows that in 1969 appellant lent Patrick Marrocco \$23,000 and that Marrocco deeded to appellant mortgage-encumbered property owned by him, which was located in Rochester, New York, as collateral for the loan (Tr. 75, 346-347). Located on the land was a nightclub then called "El Marrocco"; (the name was subsequently changed to "The Nickelodeon"). Marrocco continued to operate the nightclub as a tenant (Tr. 348-350). Appellant later insured the property (Tr. 238, 384, 425-426). Marrocco also carried insurance on the business. On January 26, 1970, The Nickelodeon was destroyed by fire (Tr. 58).

In early 1975, police officials received information that Patrick Marrocco paid arsonists to destroy The Nickelodeon because he was heavily in debt and needed money (Tr. 54-57, 59). On June 18, 1975 appellant was called in for questioning about his knowledge of the arson by Deputy John Kovack of the Monroe County, New York Sheriff's Office (Tr. 96). F.B.I. Agent Olson was present when appellant was interviewed (Tr. 98, 129, 390). Appellant initially stated that he did not know that the building had been burned intentionally (Tr. 130, 354, 390, 393, 394).

The following day, appellant was interviewed by Sheriff Mahoney (Tr. 133, 135, 236, 409). Appellant told Sheriff Mahoney that Marrocco gave Vincent Rallo, an insurance broker, \$27,000 to pay arsonists for burning the building (Tr. 239-240). Later that day, during an interview with Deputies Marks and Kovack and Agent Olson (Tr. 100, 102-104, 179), appellant told Agent Olson about the arson payment and agreed to give a written statement (Tr. 102-103).

The statement was then prepared by Deputy Marks and signed by appellant (Tr. 104, 114, 371, 432). In the written statement, as he had orally told Agent Olson and Sheriff Mahoney, appellant confirmed that he knew that Marrocco was in financial difficulty; that Marrocco told him in early 1970 that he was going to have the building burned; that Marrocco was to pay the arsonists 25% of the insurance proceeds for burning the nightclub; and that when the insurance claim was finally settled, Marrocco gave Vincent Rallo \$27,000 with which to pay the arsonists (Def. App. A9-A10).

2. On September 25, 1975, after having been granted immunity under 18 U.S.C. 6002, appellant appeared as a witness before a duly constituted federal grand jury in the Western District of New York (Tr. 290, 295, 298, 376-377, 380-381, 424; Gov't. App. A3-A4). The grand jury was investigating possible violations of 18 U.S.C. 1962 and 1341 (relating to racketeering activity and mail fraud). (Tr. 302-305).^{2/} Appellant initially refused to testify (Tr. 298,

^{2/} This investigation led to the indictment of Patrick Marrocco and Eugene DiFranciso for conspiracy to commit mail fraud and interstate transportation in aid of racketeering, in violation of 18 U.S.C. 371 and 1952. This grand jury also indicted Frank Valenti and five others for conducting an enterprise through a pattern of

(FOOTNOTE CONT'D)

424). He was then taken before Judge Harold Burke, found in contempt and was remanded to jail for his refusal to testify before the grand jury (Ibid.). Two weeks later appellant agreed to testify, and on October 9, 1975, he appeared before this same grand jury and was administered the oath (Tr. 16, 301-302). He was informed that the grand jury was investigating possible crimes against the United States; that any testimony he gave was pursuant to the grant of immunity; and that he did not have a right to refuse to answer questions based upon the Fifth Amendment. Appellant was also informed that he was under oath to testify truthfully; that he was not a potential defendant nor the target of the grand jury's investigation; that his testimony would be transcribed; and that if he testified falsely he would be subject to prosecution for perjury (Tr. 438). The offense of perjury was then defined for appellant and he was told that the maximum penalty for perjury was five years' imprisonment and a substantial fine (Tr. 438-439).^{3/}

Thereafter, appellant gave the following testimony which was specified to be false under Count One of the indictment (Def. App. A2-A4; Tr. 36-39):

Q. Let me refresh your recollection because in

2/ (CONT'D) racketeering activity or collection of an unlawful debt and conspiracy, in violation of 18 U.S.C. 1962(c) and (d). These cases are currently pending trial.

3/ Relevant portions of the reporter's original notes of the grand jury proceedings were read into evidence at trial (Tr. 36-43). At trial appellant's objection to the introduction into evidence of the entire transcript on the basis of immateriality was sustained by the trial judge.

June, when you were interviewed by Special Agent Olson, you stated at the settlement, Rallo received twenty-seven thousand dollars from Morrocco and twelve thousand dollars from yourself for a total of thirty-nine thousand dollars?

A. I did not say that.

Q. Are you saying you did not say that or that is a lie? 4/

A. I am not saying it's a lie. I did not say it. Mr. Olson told me that Mr. Rallo got twenty-seven thousand dollars from Mr. Morrocco but I never made the remark that he got twenty-seven thousand dollars from Mr. Morrocco because I don't know what he got from him. All I know is what he got from me.

Q. You never made any statement to Special Agent Olson that Rallo received approximately twenty-seven thousand from Morrocco and twelve thousand from you?

A. No sir, I did not make that statement. I made the statement about the twelve thousand from me, yes.

* * * * *

Q. Your statement that you also made to Special Agent Olson which is in the report of the interview of June, that Rallo received approximately twenty-seven thousand dollars from Morrocco, did you make that statement?

A. I did not make that statement. Mr. Olson made that statement to me.

Q. Did you doubt that statement when he made it?

4/ The reporter's notes indicate that appellant was asked: "Are you saying you did not say that or is that a lie?"

A. I didn't say nothing about it. That I doubt it, because I didn't know what Mr. Morrocco gave Mr. Rallo.

Q. You never made any such statement, you never made any such indication that Morrocco had given that money to Rallo?

A. No sir, never.

Q. If that statement was made to you by anybody else, did you nod your head or agree or state yes that is right?

A. No sir, never.

Appellant also gave the following testimony which was specified to be false under Count Two of the indictment, the count under which he was acquitted (Def. App. A5-A7; Tr. 39-42):

Q. Now let me direct your attention to January, 1970, early in the month. Did you have an occasion to at that time to meet with Mr. Morrocco at the club?

A. I believe 1970 -- yes, I must have.

Q. This is at the Nickelodeon?

A. Yes.

Q. Did you meet him several times throughout the month in early January?

A. Yes.

Q. On one of these occasions that you met with him and conversed with him, did Mr. Morrocco ever make any statement concerning an arson to be performed at the club?

A.. No sir.

Q. Let me make sure you understand the question. Mr. Moschiano, I am asking that as you have indicated you have met several times with Mr. Morrocco?

A. Yes.

Q. Early part of January, 1970, you met him in the club itself. Alright, now, what I have asked, did you at any time with Mr. Morrocco discuss the possibility of an arson or a fire at the club?

A. No sir.

Q. Mr. Morrocco never mentioned anything connected with such a subject; he never mentioned an arson at the club?

A. No sir.

Q. Did he ever make a statement that the building was going to be burned by arson because he needed to get money?

A. No sir.

Q. Do you understand my questions, Mr. Moschiano?

A. Yes.

Q. You understand exactly what I mean by arson?

A. Yes sir.

Q. You understand I am talking about an arson at the Nickelodeon night club at 884 Emerson Street?

A. Yes sir.

* * * * *

Q. Now, you also reported to the Special Agent Olson that Mr. Morrocco told you that the fire was going to cost twenty-five percent of the fire on the insurance on the business and you told Morrocco that you felt that the price was too high, is that also what you told Special Agent Olson?

A. Yes.

Q. Was that also a lie?

A. Yes sir.

Q. Did you state to Mr. Morrocco that you did not want the building burned?

A. No, because we never had that conversation with Mr. Morrocco. 5/

3. Appellant testified in his own behalf at trial, stating that Agent Olson told him that Marrocco had given the money to Rallo (Tr. 368, 412-13). He then testified that although he made the statements contained in the written statement (that Marrocco gave the \$27,000 to Rallo, that he knew the building would be burned, and that the arsonists would get 25% of the insurance proceeds), he did so only because he was coerced by the police (Tr. 367, 373, 437). Appellant also claimed that he did not see Sheriff Mahoney until after he had signed the written statement (Tr. 396).

5/ Patrick Marrocco's name is misspelled throughout the indictment.

ARGUMENT

I.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION FOR MAKING FALSE DECLARATIONS BEFORE THE GRAND JURY.

The government's evidence showed that appellant's sworn testimony before the grand jury that he had not previously told F.B.I. Agent Olson that Patrick Marrocco paid \$27,000 to Vincent Rallo for causing The Nickelodeon to be burned by arsonists was false. At the time of this testimony, the grand jury was investigating possible violations of 18 U.S.C. 1962 and 1341 (relating to racketeering activity and mail fraud) within the Western District of New York and was exploring the question of whether buildings in the Western District were destroyed by arson as well as whether and by whom the arsonists were paid (Tr. 302-305; App. A110). It had information that The Nickelodeon was one of the buildings which had been intentionally destroyed.

Appellant claims that his testimony before the grand jury was not shown to be material; that there was no evidence that his false statements were "relevant" to the purpose of the grand jury's investigation; and that the questions asked of him were ambiguous. We submit that these contentions are unsound.

1. Appellant's claim that his statements before the grand jury were not shown to be material rests on the premise that there was no showing that his false statements disrupted the grand jury and that there was no evidence that the underlying transaction about which

he testified in fact occurred.^{6/} He therefore maintains that the government was required to show, as part of its proof, by independent evidence, that Marrocco gave Rallo the \$27,000 (Br. 8-17).^{7/}

But this argument misconceives the materiality requirement. "The grand jury is an investigative body and, as such, must be permitted within limits to pursue any leads which may be uncovered". United States v. Doulin, 538 F.2d 466, 469 (2nd Cir. 1976), cert. den., ___ U.S. ___, 97 S.Ct. 256. See also Branzburg v. Hayes, 408 U.S. 665, 688 (1972). Moreover, "false testimony before a grand jury need not bear upon the ultimate question of guilt or innocence of specific federal crimes in order to possess the requisite materiality." United States v. Mancuso, 485 F.2d 275, 280 (2nd Cir. 1973). A false declaration is material if it has "a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation...." Carroll v.

6/ There was in fact testimony that the arson occurred. Angelo Monachino, a government witness, testified that appellant knew just prior to the Christmas holidays in 1969 that Marrocco planned to have The Nickelodeon burned by arsonists, and that in early 1970, appellant told Marrocco that he could have "the boys" burn the nightclub (Tr. 48-55). Monachino further testified that on January 25, 1970, he was at The Nickelodeon and was taken upstairs by Patrick Marrocco. There, he saw that the walls had been ripped out, that the windows were boarded up, and that debris was placed against the doors. An "Indian hut" made of pieces of wood and filament paper was set up against the wall. He also testified that he saw boxes which smelled of gasoline in the upstairs portion of the nightclub (Tr. 60-62).

7/ Appellant claims (Br. 10-11) that the government would have to show that the property was insured; that a claim was made and paid' and that appellant knew or was present when Marrocco gave Vincent Rallo the \$27,000. Curiously, however, appellant does not claim that the government was required to show that the nightclub was intentionally destroyed or that the \$27,000 given to Rallo was in payment for its destruction. (FOOTNOTE CONTINUED)

United States, 16 F.2d 951, 953 (2nd Cir. 1927), cert. den., 273 U.S. 763 (1927). A conviction under Section 1623 must be sustained unless truthful answers to the grand jury's questions could not have conceivably furthered its inquiry. Mancuso, supra.
8/
at 281.

Examination of both appellant's testimony before the grand jury and the evidence introduced at trial to prove that his testimony before the grand jury was false shows that had appellant testified truthfully the grand jury's investigation would have been furthered.

7/ (CONT'D) Be that as it may, the government was under no such duty. As our argument shows, the government was required to show that only appellant knowingly made false material declarations before a duly constituted grand jury.

8/ Two cases decided by this Court (United States v. Birrell, 470 F.2d 113, 115 n. 1 and United States v. Freedman, 445 F.2d 1220, 1226-1227) do contain language which suggests that in certain circumstances the government must show that further fruitful investigation would in fact have occurred. Birrell involved a false statement in an affidavit in support of a motion for leave to proceed in forma pauperis and for the appointment of counsel. The statement was held to be material, but it is not clear that the Court believed that a correct answer would in fact have led to further inquiry into that defendant's financial status. See Birrell, 470 F.2d at 115 n. 1. Freedman, involved false testimony before the Securities Exchange Commission. There, however, the Court cited Carroll approvingly. See 445 F.2d at 1226. Moreover, as this Court has noted, since neither Freedman nor Birrell involved grand jury testimony those cases are distinguishable from cases such as the present one. United States v. Doulin, supra, at 470 n. 3; United States v. Mancuso, supra, at 281 n. 17. But even assuming that the rule announced in Freedman states a test that is significantly different from the rule announced in Carroll, supra at 953, and that the rule is applicable in the present case, it is of no avail to appellant, for his false testimony was material under either the "would have" or "could have" formulation.

Prior to appellant's appearance before the grand jury, it heard testimony from Agent Olson that appellant had in fact told him that Marrocco gave Rallo \$27,000 and had also signed a written statement which contained this same information. Appellant's version before the grand jury was that he had not made the statement to Agent Olson. Thus, appellant's contradiction of Agent Olson's grand jury testimony forced the grand jury to choose between two conflicting versions. Appellant's false answers deprived the grand jury of the information that he had concerning the person who paid to have The Nickelodeon intentionally destroyed. It is clear that had appellant answered truthfully, the grand jury would have had before it a direct eye-witness account of the payment made by Marrocco, instead of the hearsay statement of the agent. See United States v. Umans, 368 F.2d 725, 730-731 (2nd Cir. 1966), cert. dismissed as improvidently granted, 389 U.S. 80 (1967).

To the extent appellant argues (Br. 8-11, 17) that underlying facts must be shown such argument is properly addressed to the element of falsity, not the element of materiality. As to this element, the evidence introduced at trial showed that appellant's version before the grand jury was completely contrary to the testimony of the government's witnesses (Tr. 239, 368, 373, 412-13, 437). In addition, appellant's signed statement also

contradicted his grand jury testimony (Def. App. A9-A10).^{9/}

2. In like vein, appellant argues that his statements were not shown to be "relevant" to the purpose of the grand jury's inquiry (App. Br. 27-28). But it is established that a witness may not object to a grand jury inquiry on grounds of relevancy. United States v. Calandra, 414 U.S. 338, 345 (1974); Blair v. United States, 250 U.S. 273, 282 (1919).^{10/} It was sufficient that the questions asked of appellant were aimed at determining who, if anyone, paid to have The Nickelodeon destroyed. As we pointed out, appellant was asked if he had previously told F.B.I. Agent Kenneth Olson that Patrick Marrocco gave Vincent Rallo \$27,000 to pay arsonists for destroying the nightclub. Appellant unequivocally denied that he ever made this statement and told the grand jury that it was Olson who told him that Marrocco had given the money to Rallo. It certainly was "relevant" to the inquiry whether

9/ Although appellant does not contend that the trial judge erred in admitting a redacted version of the June 19, 1975 statement, he argues (Br. 18-20) that since the statement was not a verbatim recordation of appellant's actual words, that portion of the statement which shows that he stated that Marrocco gave Vincent Rallo the \$27,000 may have been the result of information that appellant got from other police officials or that he "may have read it or some other thing may have occurred which would have brought this to his attention." But this argument should have been directed to the jury.

10/ The grand jury also was not required, as appellant asserts (App. Br. 5), to inform appellant of the nature of its inquiry. See Blair v. United States, supra, 250 U.S. at 282-283.

appellant had first hand knowledge of facts concerning the arson at The Nickelodeon, which was part of the grand jury's investigation into racketeering activity and mail fraud.

3. Contrary to appellant's argument (Br. 18-26), the prosecutor's questions before the grand jury were not ambiguous and appellant's responses to those questions were unequivocal (see Def. App. A2-A4). The meaning of the questions could not have escaped appellant's attention.

Absent fundamental ambiguity, the question of whether appellant knowingly gave false answers was for the jury to determine. United States v. Chapin, 515 F.2d 1274, 1279-1280 (D.C. Cir.), cert. den., 423 U.S. 1015 (1973); United States v. Wolfson, 437 F.2d 862, 878 (2nd Cir. 1973); United States v. Bonacorsa, 528 F.2d 1218, 1221 (2nd Cir. 1976), cert. den., 426 U.S. 935, (1976).

Appellant argues (Br. 24), for example, that the following question was "compound in form and capable of a double meaning":

Q. You never made any such statement, you never made any such indication that Morrocco had given that money to Rallo?

A. No, sir, never.

While this question may be compound, its thrust is clear, and appellant's answer indicates that he was not the least bit confused.^{11/}

^{11/} Appellant's reliance upon the Supreme Court's decision Bronston v. United States, 409 U.S. 352 (1973) is misplaced. In Bronston the Court held that an unresponsive but literally truthful response, even if intended to mislead, will not support a conviction for perjury. The Court also stated that "[p]recise questioning is

Appellant also claims (Br. 25) that the following question was confusing because it consisted of three parts and because there was no record of whether he nodded his head or not:

Q. If that statement was made to you by anybody else, did you nod your head, agree, or state yes that is right?

A. No, sir, never.

This question was not confusing. Rather, government counsel was seeking to determine, since appellant maintained that Agent Olson had made the statement to him, whether appellant had in any way confirmed the statement even by a movement of his head.

Appellant also argues (Br. 26) that because he denied ever making this statement to Agent Olson and because this information was contained in the written statement, which was prepared by Deputy Marks and which he signed, it was incumbent on government counsel to lead appellant through the written statement, line by line, to insure that there was no ambiguity regarding what was said on June 19, 1975. This argument lacks substance. The grand jury was attempting to determine whether appellant had told Agent Olson that Marrocco gave Rallo the money, not whether what he told the agent was also contained in his signed statement. Government counsel had no duty to lead appellant through the written statement.

11/ (CONT'D) . imperative as a predicate for the offense of perjury" (409 U.S. at 362). Appellant thus submits that even if his answer were intended to mislead, "he still cannot be punished as it is the interrogator who must ask the questions" (Br. 25). It is clear that the questions asked of appellant thoroughly and explicitly covered the matter in question.

In sum, it was for the jury to determine whether appellant misunderstood the questions asked of him. It found that appellant knowingly gave false statements before the grand jury. There is no reason to disturb that finding.

II.

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ALLOWING
THE JURY TO SEPARATE FOR A FOUR-DAY WEEKEND
AFTER IT BEGAN ITS DELIBERATIONS.

Appellant finally claims (Br. 29-31) that the trial judge improperly refused to sequester the jury.

The trial testimony began on December 28, 1976, and the case was submitted to the jury at 3:55 p.m. on Thursday, December 30, 1976. After the jurors had deliberated for almost six hours, counsel and the jury were summoned to the courtroom and the trial judge excused the jury until January 4, 1977. They were advised that the following day (December 31, 1976) was a federal holiday, with Saturday and Sunday to follow. They were also advised that because of a previous commitment of the judge to be in Buffalo, New York, on Monday, January 3, 1977, the case would be in recess until Tuesday, January 4, 1977. Before allowing the jury to leave the courtroom the judge instructed them not to talk among themselves or with anyone else about the case (Tr. 542-543).

Appellant contends that this separation was error solely because the jury was separated for four days during a "major holiday."

The purpose of sequestering the jury is to protect the jury from interference. United States v. Harris, 458 F.2d 670, 674 (5th Cir. 1972), cert. den., 409 U.S. 888 (1972). The trial judge has wide discretion in deciding whether to allow the jury to separate. United States v. Siragusa, 450 F.2d 592, 595 (2nd Cir. 1971), cert. den., 405 U.S. 974 (1972). Unless it is shown that the judge's allowance of juror separation resulted in a substantial likelihood that appellant was prejudiced by the separation, that discretion should not be disturbed. United States v. Acuff, 410 F.2d 463, 467 (6th Cir. 1969), cert. den., 396 U.S. 830 (1969).

In the instant case, however, appellant has not even alleged that there was any improper approach to any juror, or any impropriety of any sort during the time the jury was separated. Rather, he argues that error was committed solely because the jury was separated for four days during a "major holiday". But the fact of separation alone does not establish a claim to a reversal.

The trial judge chose to recess the jury because of an official holiday, because the weekend followed this holiday, and because other business called him for the city. This decision was justified by the circumstances and the trial judge committed no error.

CONCLUSION

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief / *4 APPENDIX*
for the United States have this day been mailed to counsel
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